

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Red Lion Broadcasting Company, Inc.)	
)	CSR-6586-M
v.)	
)	
Echostar Satellite LLC)	
)	
Request for Carriage of Station WGCB-TV)	
Red Lion, Pennsylvania)	

MEMORANDUM OPINION AND ORDER

Adopted: June 29, 2005

Released: July 1, 2005

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Red Lion Broadcasting Company, Inc. (“Red Lion”), licensee of television station WGCB-TV, Red Lion, Pennsylvania (Ch. 49) (“WGCB” or “Station”) has filed a complaint (“Complaint”) against Echostar Satellite LLC (“Echostar”)¹ pursuant to Section 338 of the Communications Act of 1934, as amended (“Act”).² Echostar filed an opposition to the Complaint and Red Lion filed a reply. For the reasons discussed below, we find in favor of Echostar and dismiss the Complaint.

II. BACKGROUND

2. Section 338 of the Act, adopted as part of the Satellite Home Viewer Improvement Act of 1999 (“SHVIA”),³ requires satellite carriers, beginning January 1, 2002, to carry upon request all local television broadcast stations’ signals in local markets in which the satellite carrier carries at least one local television broadcast signal pursuant to the statutory copyright license.⁴ For the initial election cycle, broadcast stations were required to notify satellite carriers by July 1, 2001 of their mandatory carriage election for carriage to commence by January 1, 2002. A station’s market for satellite carriage purposes is its Designated Market Area, or DMA, as defined by Nielsen Media Research.⁵ In November 2000, the Commission adopted rules to implement the carriage provisions contained in Section 338.⁶

¹ See *Special Relief and Show Cause Petitions*, Report No. 0137 (rel. Mar. 18, 2005) (Public Notice).

² 47 U.S.C. § 338.

³ See Pub. L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999).

⁴ See 47 U.S.C. § 338.

⁵ A DMA is a geographic area that describes each television market exclusive of others, based on measured viewing patterns. See 17 U.S.C. § 122(j)(2)(A)-(C).

⁶ See *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues; Retransmission Consent Issues*, 16 FCC Rcd 1918, 1934 (2000) (“DBS Mandatory Carriage Report & Order”).

3. Under the Commission's broadcast signal carriage rules, each satellite carrier providing local-into-local service pursuant to the statutory copyright license is generally obligated to carry any qualified local television station in the particular DMA that has made a timely election for mandatory carriage, unless the station's programming is duplicative of the programming of another station carried by the carrier in the DMA.⁷ In a DMA where a satellite carrier launches new local-into-local service, the carrier must notify local television stations in writing of its intent to provide such service at least 60 days in advance and identify the location of its local receive facility.⁸ Upon receipt of this notice, local television stations must request carriage within 30 days.⁹ If a satellite carrier denies a local station's carriage request, it must notify the station within 30 days of the carrier's receipt of the carriage request.¹⁰ Otherwise, local television stations must be carried by the later of 90 days from the satellite carrier's receipt of the station's election request or upon commencing local-into-local service in the new television market.¹¹

4. If a local television broadcast station believes that a satellite carrier has failed to meet its obligations under Section 338 of the Act or the Commission's implementing regulations, such station shall first notify the carrier, in writing, of the alleged failure and identify its reasons for believing that the satellite carrier failed to comply with such obligations.¹² Within 30 days after such written notification, the satellite carrier shall respond in writing and comply with such obligations or state its reasons for believing that it is in compliance with such obligations.¹³ If Commission action is necessitated, as the station alleges here, a broadcast station may file a complaint with the Commission within 60 days after the satellite carrier submits a final rejection of a broadcast station's carriage request.¹⁴ If a satellite carrier provides no response to a mandatory carriage election, the 60 days commences after the time for responding as required by the rule has elapsed.¹⁵

III. DISCUSSION

The Commission later affirmed and clarified its satellite carriage rules. *See Implementation of the Satellite Home Viewer Improvement Act of 1999; Broadcast Signal Carriage Issues*, 16 FCC Rcd 16544 (2001) ("DBS Mandatory Carriage Reconsideration Order").

⁷ See 47 C.F.R. § 76.66. A satellite carrier provides "local-into-local" satellite service when it retransmits a local television signal back into the local market of that television station for reception by subscribers. 47 C.F.R. § 76.66(a)(6).

⁸ See 47 C.F.R. § 76.66(d)(2). Pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, § 205 (Dec. 8, 2004) ("SHVERA"), the Commission recently revised Section 76.66(d)(2) to require that a satellite carrier's local-into-local notice also inform television stations (i) of the right of the licensee to elect carriage or grant retransmission consent, (ii) that the licensee has 30 days from the date of receipt of such notice to make such election, and (iii) that failure to make such election will result in the loss of the right to demand carriage for the remainder of the three-year carriage cycle. *See Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, FCC 05-81 (rel. Mar. 30, 2005) ¶13 ("SHVERA Procedural Order"). As directed by SHVERA, the Commission also revised Section 76.66(d)(2) to provide that such notices must be sent via certified mail to the address listed in the Commission's consolidated database system. *Id.*

⁹ See 47 C.F.R. § 76.66(d)(2).

¹⁰ See *id.*

¹¹ See 47 C.F.R. § 76.66(d)(2)(iii).

¹² See 47 U.S.C. § 338(f)(1); see also 47 C.F.R. § 76.66(m)(1).

¹³ See 47 C.F.R. § 76.66(m)(2).

¹⁴ See 47 C.F.R. § 76.66(m)(6).

¹⁵ See *DBS Mandatory Carriage Reconsideration Order*, 16 FCC Rcd at 16574.

5. Echostar currently provides local-into-local satellite service in the Harrisburg-Lancaster-Lebanon-York DMA, pursuant to the statutory copyright license.¹⁶ By letter dated August 16, 2002 (“2002 Letter”), Echostar notified WGCB that it would commence local-into-local service in the Harrisburg DMA.¹⁷ The 2002 Letter was sent to the Station at a P.O. Box address in Red Lion, Pennsylvania, which WGCB shares with WINB, an international shortwave broadcast station located near WGCB and owned by the same principals as WGCB.¹⁸ Echostar received a certified mail receipt dated August 20, 2002, which was signed by an employee of WINB.¹⁹ Red Lion states, however, that it had no actual notice of the commencement of local-into-local service by Echostar in the Harrisburg DMA until late 2004, when it began receiving complaints from over-the-air viewers of the Station who found that upon subscribing to Echostar’s service, they were unable to receive the Station.²⁰ Thus, on October 21, 2004, more than two years after Echostar sent the 2002 Letter, Red Lion sent Echostar a letter demanding carriage of the Station.²¹ Echostar responded by letter dated November 1, 2004, rejecting Red Lion’s demand for carriage as untimely.²² Red Lion filed its Complaint on February 15, 2005.

6. We first address the timeliness of Red Lion’s Complaint. Echostar argues that Red Lion’s Complaint is late-filed and must be dismissed.²³ As discussed above, a broadcast station may file a complaint with the Commission within 60 days after the satellite carrier submits a final rejection of a broadcast station’s carriage request.²⁴ In the instant case, Echostar rejected Red Lion’s request for carriage by letter dated November 1, 2004.²⁵ If the parties are negotiating a carriage dispute, the 60-day period does not begin to run until resolution efforts have failed.²⁶ Red Lion asserts that the parties continued to negotiate following Red Lion’s receipt of the Denial Letter.²⁷ Red Lion did not introduce any evidence in the record to indicate that the parties continued to communicate regarding carriage after the Denial Letter. Accordingly, there is no basis on which we can conclude that the Station reasonably could have assumed that negotiations were ongoing.²⁸ Thus, the 60-day period for filing a complaint commenced with Echostar’s November 1, 2004 rejection of the carriage request.²⁹ The Complaint was filed on February 15, 2005. We therefore dismiss Red Lion’s Complaint as untimely.³⁰

¹⁶ Opposition at 1 (“Echostar began providing local-into-local service in the Harrisburg DMA on or about September 26, 2002”).

¹⁷ Complaint at 6, Exhibit 1.

¹⁸ *Id.* at 2-3.

¹⁹ *Id.* at 2.

²⁰ *Id.*

²¹ Letter from Christopher Imlay, Esq., Counsel to Red Lion, to Charles Ergen, Echostar (Oct. 21, 2004).

²² Letter from Keely Goldberg, Echostar Satellite LLC, to Christopher Imlay, Esq., Counsel to Red Lion (Nov. 1, 2004) (“Denial Letter”).

²³ Opposition at 2-4.

²⁴ *See* 47 C.F.R. § 76.66(m)(6).

²⁵ Opposition at 3, Exhibit 3.

²⁶ *See DBS Mandatory Carriage Reconsideration Order*, 16 FCC Rcd at 16574.

²⁷ Reply at 3-4.

²⁸ *Compare New Life Evangelistic Center, Inc. v. Echostar Satellite LLC*, 19 FCC Rcd 24947, 24949 (MB 2004) (“*New Life*”) (finding that the record indicated that the parties continued to negotiate through correspondence, and that the 60-day period did not commence until a final denial letter was received).

²⁹ *DBS Mandatory Carriage Reconsideration Order*, 16 FCC Rcd at 16574.

³⁰ Our decision here in no way limits or prevents the Station from electing mandatory carriage for the next election

7. We note that if Red Lion's Complaint had been timely filed, it appears that we would need to consider other procedural inadequacies on the part of both parties. First, with respect to Echostar, Section 76.66(d)(2) of our rules requires that a satellite carrier "notify local television stations of its intent to provide local-into-local service at least 60 days before it intends" to commence such service.³¹ Echostar states that it "began providing local-into-local service in the Harrisburg DMA on or about September 26, 2002."³² The record is clear, however, that Echostar provided notice to stations in the DMA of its intent to launch such service by letter dated August 16, 2002.³³ Thus, if the September 26, 2002 date is correct, it appears that Echostar began providing local-into-local service only 41 days after it notified local stations that it intended to do so, rather than at least 60 days later, as required by our rules. Red Lion did not raise this issue in its Complaint or Reply. Moreover, we note that Echostar's apparent failure to meet the 60-day requirement is not relevant to the harm alleged by Red Lion. Even if Echostar had refrained from launching local-into-local service in the Harrisburg DMA until October 15, 2002—60 days after providing notice—it would still have been providing local-into-local service for more than two years by the time Red Lion attempted to elect mandatory carriage in October 2004, as further discussed below.

8. Second, with respect to the Station, it appears that Red Lion failed to request carriage within 30 days of Echostar's 2002 Letter, as required by our rules. Red Lion argues that the 2002 Letter did not constitute notice under Section 338 of the Act and Section 76.66 of the Commission's rules because it was not sent to the proper address and it was misleading.³⁴ Red Lion claims that Echostar's notice was "received by a company that had no employee overlap with Red Lion" and that "the person who accepted and signed the certified mail [receipt] was neither Red Lion's employee nor its representative."³⁵ In opposition,³⁶ Echostar states that it sent the 2002 Letter by certified mail to the Station at the Station's P.O. Box address listed in the Commission's database, and that return of the certified mail receipt reasonably indicated to Echostar that the Station had received proper notice.³⁷ At the time Echostar sent the 2002 Letter, Section 76.66(d)(2) did not specify the location where such notices must be directed.³⁸ The Commission has since amended Section 76.66(d)(2), as required by SHVERA,³⁹

cycle, for which the election deadline is October 1, 2005 for carriage commencing January 1, 2006.

³¹ 47 C.F.R. 76.66(d)(2).

³² Opposition at 2.

³³ *Id.*; Complaint at 6, Exhibit 1.

³⁴ Complaint at 3.

³⁵ Reply at 6-7.

³⁶ Red Lion argues that Echostar's opposition is untimely because it was filed 51 days after Echostar was served with the Complaint. Reply at 2. As Red Lion notes, however, the Commission has determined that carriage complaints filed against satellite carriers should be treated as petitions for special relief for purposes of pleading requirements. *Id.*; 1998 Biennial Regulatory Review: Part 76—Cable Television Service Pleading and Complaint Rules, 14 FCC Rcd 418 (1999); 47 C.F.R. § 76.66(m)(3). Accordingly, we apply the rule for pleadings responsive to petitions, 47 C.F.R. § 76.7(b)(1), which provides that "interested persons may submit comments or oppositions within twenty (20) days after the date of public notice of the filing of such petition." Thus, the deadline for filing oppositions is calculated as 20 days from the date of the public notice, which was released on March 18, 2005. *See supra* note 1. Accordingly, the Opposition was timely filed on April 7, 2005.

³⁷ Opposition at 6. Echostar states that other documents filed by the Station with the Commission indicate Red Lion's P.O. Box address as the Station's mailing address. *Id.*

³⁸ 47 C.F.R. § 76.66(d)(2). *See also New Life*, 19 FCC Rcd at 24949; *Ho'Ana'Auao Community TV, Inc. v. Echostar Communications Corporation*, 18 FCC 2487, 2489 (MB 2003) ("*Ho'Ana'Auao*").

³⁹ Pub. L. No. 108-447, § 205 (Dec. 8, 2004).

to require satellite carriers to transmit such notices “via certified mail to the address for [a] television licensee listed in the consolidated database system maintained by the Commission.”⁴⁰ Under the rules in effect at the time Echostar sent the 2002 Letter, the Commission applied a reasonableness standard to determine whether a satellite carrier had used an acceptable address for purposes of Section 76.66.⁴¹ Applying this standard, we previously have found that the address of record for Commission purposes is an acceptable address for purposes of Section 76.66.⁴²

9. Red Lion also claims that the 2002 Letter did not identify Echostar’s service by its commercial name (Dish Network) and failed to indicate the nature of the service to be commenced, making it unreasonable to expect Red Lion to have responded with a carriage election.⁴³ Red Lion states that it “had never dealt with Echostar and was not aware of [Echostar’s] commencement of local-into-local service until [Red Lion] began receiving complaints . . . [that the Station] was not carried on [Echostar’s] system in the Harrisburg-York-Lancaster-Lebanon DMA.”⁴⁴ In opposition, Echostar argues that the 2002 Letter contained all relevant information under Section 76.66(d)(2) and that, prior to adoption of Commission rules implementing SHVERA, there was no requirement that a satellite provider put a station on notice that a letter triggers important rights.⁴⁵ Applying the rules in effect at the time Echostar sent the 2002 Letter, we previously have found that a satellite carrier has no obligation to mark a local-into-local notice as having legal implications.⁴⁶ The Commission’s rules require a television station to request carriage within 30 days of receiving notice that a satellite carrier intends to commence local-into-local service—in this case, by September 9, 2002.⁴⁷ It is undisputed that WGCB did not attempt to elect mandatory carriage until October 21, 2004. Thus, it appears that WGCB’s election was untimely because it failed to request carriage within 30 days of Echostar’s 2002 Letter.

⁴⁰ *SHVERA Procedural Order*, ¶13; 47 C.F.R. § 76.66(d)(2).

⁴¹ See *New Life*, 19 FCC Rcd at 24950; *Ho’Ana’Auao*, 18 FCC at 2489.

⁴² We found in *New Life*, which was adopted prior to the Commission’s amendment of Section 76.66(d)(2), that the licensee address listed in the Commission’s database was acceptable for purposes of the rule. See *New Life*, 19 FCC Rcd at 24951. We note that, pursuant to the revision of the Commission’s rules as directed by SHVERA, the licensee address listed in the Commission database is now the only acceptable address for purposes of Section 76.66.

⁴³ Complaint at 3. Red Lion offers as support for this contention the assertion that Echostar is carrying the signal of every other local station in the Harrisburg DMA. Complaint at 4; Reply at 4. However, Echostar states that it sent virtually identical letters to all stations in the market. Opposition at 1. Assuming that Echostar is now carrying these stations, as Red Lion alleges, it appears that the notice was sufficient to alert the other stations in the market of the opportunity to elect mandatory carriage.

⁴⁴ Reply at 6.

⁴⁵ Opposition at 8.

⁴⁶ See *New Life*, 19 FCC Rcd at 24951; *Entravision Holdings, Inc. v. Echostar Communications Corporation*, 18 FCC Rcd 19268, 19271 (MB 2003). The requirements adopted in the *SHVERA Procedural Order* were not in effect at the time Echostar sent the 2002 Letter. See *SHVERA Procedural Order*, ¶13; *supra* n. 7.

⁴⁷ 47 C.F.R. § 76.66(d)(2).

IV. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED**, pursuant to Section 338(f) of the Communications Act, as amended, 47 U.S.C. § 338(f), and Section 76.66 of the Commission's rules, 47 C.F.R. § 76.66, that the mandatory carriage complaint of Red Lion Broadcasting Company, Inc., licensee of commercial television station WGCB-TV, Red Lion, Pennsylvania, **IS DISMISSED**.

11. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.⁴⁸

FEDERAL COMMUNICATIONS COMMISSION

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⁴⁸ 47 C.F.R. § 0.283.